IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 1106

ROBERT E. HANNEGAN, Individually and as Postmaster General of the United States,

Petitioner,

v.

READ MAGAZINE, INC., *et al.*

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR RESPONDENTS IN OPPOSITION

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Opinions Below

The opinion of the United States District Court for the District of Columbia (R. 75-83) is reported at 63 F. Supp. 318. The opinion of the Court of Appeals is reported at 158 F. (2) 542.

Jurisdiction

The judgment of the Court of Appeals was entered on December 9, 1946 (R. 120). The jurisdiction of this Court is invoked under the provisions of Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Question Presented

Whether, in a suit to enjoin a fraud order issued by the Postmaster General on the ground that respondents were engaged in conducting a scheme or device for obtaining money through the mails by means of false or fraudulent pretenses, representations or promises, the Courts below properly found that there was no substantial evidence before the Postmaster General upon which the fraud order could lawfully be issued.

Statutes Involved

The statutes involved are R. S. § 3929 (39 U. S. C. 259), as amended by the Act of September 19, 1890, c. 908, § 2, 26 Stat. 465, 466, as further amended by the Act of March 2, 1895, c. 191, § 4, 28 Stat. 963, 964, and R. S. § 4041 (39 U. S. C. 732), as amended by the Act of September 19, 1890, c. 908, § 3, 26 Stat. 465, 466. These statutes are set forth in full in the appendix to the petition at pages 20-22.

Statement

On October 1, 1945 the Postmaster General issued a fraud order against respondents purportedly in accordance with Sections 259 and 732, Title 39, U. S. Code. This order was addressed to the Postmaster at New York, New York, the city where respondents' business was located, and forbade him to pay any postal money order drawn to respondents' order, directed him to inform the remitter of any such postal money order that payment thereof had been forbidden, and to return all mail addressed to respondents marked "Fraudulent." The order so issued was made after a hearing before an Assistant Solicitor to the Postmaster-General, at which the following undisputed facts appeared:

Respondent Read Magazine is a New York corporation, a subsidiary of respondent, Publishers Service Company, Inc., and the owner and publisher of "Read" and "Facts" Magazines (R. 64). Respondent Literary Classics, Inc. is a New York corporation, a subsidiary of Publishers Service Company, Inc., engaged in the business of publishing classical literature (R. 65). Publishers Service Company, Inc. is a corporation originally organized under the laws of Delaware in 1928, whose successor of the same name, the respondent, was organized under the laws of New York in 1930 (R. 64-65). The business of the last-mentioned company is the promotion of circulation of newspapers through contests, and through its subsidiaries, the publishing of magazines and classical literature and the manufacture of phonograph records (R. 65). In the newspaper field, respondent Publishers Service Company, Inc. has conducted about 150 contests for the promotion of circulation of leading American newspapers (R. 65). It has also conducted contests for the promotion of subscriptions to magazines and the sale of books published by its subsidiary, Literary Classics, Inc. (R. 65).

In April 1945 respondents offered to the public through "Facts" Magazine and national newspaper advertising a contest which they denominated "Facts Magazine's Puzzle Contest." This contest was conducted for the purpose of promoting the sale of books published by respondent Literary Classics, Inc. (R. 42, 65). Each puzzle in the contest was a rebus which is a puzzle representing a word or words by letters, numerals or pictures, or by a combination of the three. A first prize of $10,000 and 499 other cash prizes were offered to winners of the contest (R. 30-31, 65).

The contest was governed by rules, which were printed in every announcement of the contest and in the booklet containing the puzzles (R. 30-31, 32-33). In the announcements of the contest, seven references to the rules were made, and the contestants were repeatedly urged to read them (R. 30-31).

The rules of the contest provided for the presentation to contestants of a group of 80 rebus puzzles, divided into 20 series of 4 puzzles each. The contestant was required to submit 15 cents with his solutions to each series of 4 puzzles in return for which he received a book, regardless of the correctness of his solutions. Tying contestants were required to solve an additional 80 puzzles and to pay 15 cents with each series of 4 solutions, for which they received another book, regardless of the correctness of their solutions. Those contestants who succeeded in solving the second group of 80 puzzles were required to solve an additional 80 puzzles and to remit 15 cents with each series of 4 solutions, for which another book was given. In addition, the contestants competing in the solution of the last group of 80 puzzles were required to submit a letter on a stated subject which was to be judged by the standard of originality of description and general interest. All these terms of eligibility for prizes were stated in the published rules of the contest (R. 30-31, 32-33).

The sponsors of the contest, realizing that there probably would be ties in the solution of the puzzles in the contest, stated this anticipation in the rules as follows:

> "Upon entering the contest, the entrant is asked to realize that the sponsor anticipates that a large number of persons may enter the contest and that a large number may solve one, two or all three of the Groups of Puzzles * * *" (Rule 9, R. 30-31).

In respect of ties, Rule 9 of the Official Rules of the contest provided as follows:

> "* * * In case of ties, if two or more persons tie in submitting the correct solutions, then the first two or more prizes will be reserved for those contestants and will be awarded in the order of accuracy of the submissions of those contestants to a first, and if necessary, a second, tie-breaking group of puzzles, divided into Series exactly like the first

Group. In case a second tie-breaking Group of puzzles is necessary, contestants eligible to solve same will be required to accompany their solutions to this second tie-breaking Group of puzzles with a letter of not more than 200 words on the subject: 'The Puzzle I Found Most Interesting and Educational in This Contest.' All tie-breaking Series must be qualified in accordance with the provisions of Rule No. 8. Only in case ties exist after such final tie-breaking puzzles have been checked will the letters be considered, and in that event they will be judged on the basis of originality in description and general interest."

Rule 8 of the Rules of the contest provided in part as follows:

> "To qualify for a prize, the contestant is required to accompany each Series of four solutions with 15 cents in coin."

The requirement of remittances of 15 cents with each series of four puzzles was stated in identical language both with respect to the original group of puzzles and to the tie-breaking groups of puzzles (Rules 8, 9, R. 30-31).

Approximately 190,000 contestants entered the contest, and 90,000 submitted their solutions to the first group of puzzles (R. 32, 43). Of these 90,000, about 35,000 submitted correct solutions to the original 80 puzzles (R. 32, 43). Of these 35,000, about 27,000 succeeded in solving the first group of tie-breaking puzzles, and continued in the contest. None of these contestants was called at the hearing to testify that he had been misled by the rules of the contest.

In view of the above-quoted rules of the contest dealing with the remittances which were required for eligibility, the quoted statement of the Solicitor of the Post Office Department misstates the facts. At page 6 of the petition, the Solicitor of the Post Office Department is quoted as follows:

> "The circular containing these 'Tie-Breaker' puzzles now states the fact that should have been clearly set forth by the promoters at the outset, namely, that the entrant is required to pay an additional $3.00 for the privilege of submitting solutions to the 'Tie-Breaking' puzzles in order to remain in the contest."

The further statement that the Literary Classics Book Club was simply a term used by the respondents and that no book club existed in fact is contradicted by the evidence in the case (R. 101).

The disposition of the Post Office Department to ignore the rules of the contest in an effort to support its charge that the contest was not a puzzle contest is pointedly evidenced by the memorandum of the Solicitor embodying his findings of fact, part of which is quoted at page 7 of the petition. In this memorandum the Solicitor states:

> "Throughout the contestant's participation in this so-called 'puzzle contest' up to this stage thereof, the fiction is maintained that the prizes may be won by those who correctly solve all of the simple rebus puzzles sent them by the promoters."

At another point in his memorandum, in contradiction of the quoted statement, the Solicitor said:

> "Reference to any feature other than puzzles to be considered by the participants in this contest is found only by close examination of the Rules, which represent that upon the occurrence of what appears to be a remote contingency the contestant will be called upon to submit a letter upon the subject 'The Puzzle I Found Most Interesting and Educational in This Contest'" (R. 32).

Even the Solicitor admits that by "close examination" of the rules the requirement is found that a letter in addition to correct puzzle solutions be submitted by the contestant as a condition to eligibility for a prize. In view of the re-

quirement that 240 puzzles be correctly solved before the letter submission is to be judged, the respondents were justified in denominating the contest a "Puzzle Contest."

There is no claim by petitioner that the provision for the submission of a letter to accompany the solutions to the third group of 80 puzzles was not contained in the rules, but he argues that because the sponsor had reason to believe that the contest would be determined by the judgment of letter submissions it was improper to call it a puzzle contest. In view of the rules requiring the solution of 240 puzzles prior to the submission of a letter in the competition, it seems that it would have been a misrepresentation to state that prizes would be awarded solely on the basis of the merits of letter submissions alone.

On November 15, 1945, at the suit of respondents, the United States District Court for the District of Columbia granted a permanent injunction against petitioner, restraining him from putting into effect the fraud order which he had issued against them (R. 84-85). The Court found upon examination of the evidence that the complete plan of the contest was revealed and that the objection of the Postmaster General to the denomination of the contest as a "Puzzle Contest" was solely a dispute over nomenclature (R. 75-83). Upon appeal the judgment of the District Court was affirmed. The Court of Appeals noted that:

> "Appellant does not claim that any statement in the advertisements was untrue or that there was any departure from the procedure announced in the Official Rules of the Contest. There is no claim by him that the judging of the letters was to be other than bona fide, or that any contestant failed to receive the promised books. No contestant, so far as the record shows, complained of being misled or defrauded. In other words, the fraud order is not premised upon specific or affirmative misstatements, or upon failure to perform as promised, but is premised upon an impression which appellant says is conveyed by the advertisements as a whole. * * *

> The rule is broad; a false pretense, representation or promise may be made by impression. But such impression must be fairly derived. * * *
>
> To support appellant's conclusion in this case, one must ascribe to the advertisements an impression directly contrary to the stated rules of the contest. One must thus assume that readers were led not to read the Rules, or were led to ignore them or to misunderstand them or to believe something else contrary to their statement. There is no evidence, we think, to support any of those assumptions. The Rules were legibly printed. They were emphasized, rather than minimized, in the text. They were clear to any reasonable mind. No contradictory expressions occurred elsewhere" (R. 113).

Argument

There is not now, nor has there ever been, any dispute between the parties regarding the essential facts in this case. The dispute solely concerns the interpretation of those facts. The petitioner has contended that they evidence fraud because they create a false impression. The respondents contend the contrary. The power of the Postmaster General to issue a fraud order depends for its legal exercise upon the presentation before him of "evidence satisfactory to him" that a person or company is conducting a scheme for obtaining money through the mails by means of false or fraudulent pretenses, representations or promises. "Evidence satisfactory to him" has been interpreted to mean "substantial evidence" (*Leach* v. *Carlile*, 258 U. S. 138, 139-140). The privilege of the use of the mails may not be denied by the Postmaster General for just any reason at all (*Hannegan* v. *Esquire, Inc.*, 327 U. S. 146, 156). It may be denied only upon presentation to the Postmaster General of substantial evidence of fraud. The norm of "substantial evidence" is essential to prevent an arbitrary or capricious exercise of power by the Postmaster General. Uniformity of exercise of the power requires

that there be some standard by which all Postmasters General are guided.

The determination of whether there was substantial evidence before the Postmaster General in the instant case did not involve a substitution of the court's inferences from evidence for those of the Postmaster General. Neither court denied the Postmaster General's power to base inferences upon substantial evidence. Both courts properly denied the Postmaster General's right to infer that the contest was fraudulent because of the absence of any evidence from which an inference of fraud could be drawn. This court has recognized that an order of the Postmaster General may be enjoined if it is not based upon substantial evidence of fraud. In *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, this court said at page 106:

> "Other instances might be adduced to illustrate the proposition that these statutes were not intended to cover any case of what the Postmaster General might think to be false opinions, but only cases of actual fraud in fact, in regard to which opinion forms no basis."

See also *Leach* v. *Carlile*, *supra*, pages 139-140.

1. Petitioner contends that the contest should have been denominated a "letter-writing contest" instead of a "puzzle contest," since it was probable that the ultimate prize winners would be determined on the basis of the merits of their letter submissions rather than the correctness of their puzzle solutions (Petition, pp. 13-14). It is at least doubtful that the suggested nomenclature would have satisfied the petitioner's standard of business ethics, in view of the fact that the contestant was required, prior to submitting a letter in the competition, to solve 240 puzzles.

The only question presented by the petition is whether the Courts below exceeded their powers in holding that it

was not fraudulent to represent the instant contest as a "puzzle contest" because the determination of winners was based not only upon the solution of puzzles, but also upon the merit of the letter required by the rules to be submitted with the solutions to the last 80 of the 240 puzzles. No contention is made by petitioner that this condition of eligibility for a prize was not stated in the rules of the contest. It appears to be contended, however, that the contestants would not read the rules or would be misled upon reading them. From the small type in which the rules were printed it is argued that there was an intent to conceal the letter-writing term of eligibility for a prize. All the rules were printed in the same size type as that dealing with the letter-writing term of the rules (R. 30-31, 32-33). The same argument might as logically be used to condemn as instruments of fraud insurance policies, bills of lading, United States Treasury bonds, postal savings certificates and other legal documents.

Predicated upon the large type in the announcement of the contest denominating it a puzzle contest, and the smaller type of the rules setting forth the letter-writing term of eligibility for prizes, Mr. Justice EDGERTON in his dissenting opinion has ascribed an intent to respondents to conceal the letter-writing term of the rules of the contest. He argues that if respondents *intended* to convey to all or any of their readers either (1) the idea that the contest was merely a puzzle contest, or (2) the idea that there was a substantial chance that prizes would be won merely by solving puzzles, respondents made a false pretense, and if the Postmaster General could reasonably find either of those intents, the fraud order must be sustained (R. 116). It is submitted that this is not a correct statement of the law. If it were anyone could be barred from use of the mails, if his advertising gave a Postmaster General the impression that he intended to defraud the public, regardless of the clarity of the advertising. The statute under which the Postmaster General acted does not condemn a

malign intent of itself. In order to come within the ban of the statute, such intent must be put into effect by overt acts of fraud, whether consisting of false representations or concealment of material facts. Substantial evidence of fraud does not consist of an imputation by the Postmaster General of a malign intent based upon his impression of representations which are true and innocent in themselves. There must be an objective standard apart from the subjective view of the Postmaster General. Fraud is composed of the following elements: (1) a false representation, (2) in reference to a material fact, (3) made with knowledge of its falsity, (4) and with intent to deceive, (5) with action taken upon reliance upon the representation. *Pence* v. *U. S.*, 316 U. S. 332, 338. By definition, fraud is objective. If the evil design remains wholly in the mind, it cannot constitute fraud. The evidence warranting the issuance of a fraud order must demonstrate something more than an unconsummated evil intent. Petitioner does not purport to be able to point to any false representations or failure by respondents to state any fact material to the contestant's eligibility for prizes in the competition. He points only to the impressions which he says the evidence creates in him.

Mr. Justice EDGERTON's dissenting opinion, upon which petitioner heavily relies, indicates a neglect by him of the established norm of substantial evidence of fraud as a warrant for the issuance of a fraud order. In his opinion he stated:

> "We asked counsel whether he argued that no reasonable man could conclude that appellees intended to convey the idea that their contest was exclusively a puzzle contest. He replied: 'Of course we must concede that *a* reasonable man might draw that conclusion but we contend that *the* reasonable man would not draw it' " (R. 119).

From this excerpt from the dissenting opinion it appears that Mr. Justice EDGERTON is of the view that any Post-

master General who reasoned that, regardless of the absence of misrepresentations, respondents intended to convey a misimpression, must be sustained in that conclusion. Such dependence upon the personality of a Postmaster General for the administration of law would destroy the essential principle that ours is a government of laws, not of men. Such unconventional grant of power cannot be assumed, since it would raise grave constitutional questions. This Court has refused to permit the intrusion into our law of so alien a policy. In *Hannegan* v. *Esquire, Inc.*, *supra*, at page 158, this Court said:

> "* * * But to withdraw the second-class rate from this publication today because its contents seemed to one official not good for the public would sanction withdrawal of the second-class rate tomorrow from another periodical whose social or economic views seemed harmful to another official."

2. The action of the United States District Court and the Court of Appeals in the instant case did not violate the principle stated by this Court that the inferences from the evidence are to be drawn by the administrative agency and not by the courts. In each of the cases cited by petitioner (Petition, p. 15), this Court, as did the courts below in the instant case, carefully reviewed the evidence before the agency to determine the existence of substantial evidence warranting the inferences which the agency drew. In the cases cited by the petitioner this Court found the existence of substantial evidence from which the agency's inferences could be drawn. In the instant case the courts below found no such evidence.

Petitioner contends that the Court below determined for itself what "a reasonable reader" would believe, and that this may not be the proper substantive approach (Petition, p. 16). The evidence reveals that the announcement and rules of this contest were addressed to the public at large. There is no evidence that they were addressed to

any particular segment of that public. The capacity to understand the announcement and rules therefore is the capacity of the average or reasonable man. In the absence of any evidence that the representations regarding the contest were addressed to others than persons of reasonable intelligence and would consequently be misunderstood, the Postmaster General cannot conclude that they were so addressed. If the rule were otherwise, the Postmaster General could bar from the mails any advertisement that he thought could possibly mislead the most unreasonable member of the public. If the Postmaster General may apply such standard in issuing a fraud order, he possesses the power of life and death over most of America's business enterprises. It cannot be presumed that Congress granted him such unfettered power.

There is no conflict between the instant case and *Federal Trade Commission* v. *Standard Education Society*, 302 U. S. 112, where this Court stated the principle that:

> "The fact that a false statement may not be obviously false to those who are trained and experienced does not change its character, nor take away its power to deceive others less experienced" (p. 116).

There it was represented that an encyclopedia would be given free to the purchasers of the loose-leaf supplements, the purchase price of which was $69.50. In reality, both encyclopedia and supplements regularly sold for $69.50. The statement therefore that the encyclopedia was being given away free was false. No false statement whatsoever was made by respondents in the instant case.

3. The question presented in the instant case is not new. The definition of fraud is known to every Court and should be known by every administrative agency. No Court is unqualified to determine the existence of evidence of fraud. This Court can add nothing to its ancient definition.

Petitioner fears that the instant decision "will permit shrewd and unscrupulous advertisers to take advantage of a large portion of the public by stating facts accurately but in a manner deliberately calculated to give an erroneous impression" (Petition, p. 18). It is difficult to see how the Postmaster General could properly issue a fraud order against an advertiser for "stating facts accurately." If he could, the Postmaster General would be "the unrestricted master of much of the country's business (R. 115).

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

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